No. 82-1604

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD DEWEY,
PETITIONER,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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I

Questions Presented By Petitioner

1. Did the First Circuit Court of Appeals err in applying to the dismissal for failure to state a claim of the civil rights complaint in this case a standard of review more stringent, (a) than that which it would apply to other, non-civil rights cases, (b) than that which would be applied in other circuits, and (c) than what is called for under the Federal Rules of Civil Procedure and in *Conley* v. *Gibson*, 355 U.S. 41 (1957)?

2. Did not the First Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where the numerous paragraphs in the complaint of the petitioner, construed as they must be in the light most favorable to him, set forth sufficient allegations to state claims for relief even under the more stringent standard of review for civil rights cases applied by the First Circuit Court of Appeals?

LIST OF PARTIES

RICHARD DEWEY (retired Professor of Sociology)
PETITIONER

v.

THE UNIVERSITY OF NEW HAMPSHIRE
ALLAN SPITZ (former Dean of the College of Liberal Arts)
EUGENE S. MILLS (former President of the University)
MURRAY STRAUS (Professor of Sociology,
former Department Co-Chairman)
STUART H. PALMER (Chairman, Department of Sociology
and Anthropology)
EVELYN E. HANDLER (President of the University)
GORDON A. HAALAND (Vice President for
Academic Affairs)
ROLAND KIMBALL (Interim Dean of the
College of Liberal Arts)
RESPONDENTS

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Opinions Below

The opinion of the First Circuit Court of Appeals is officially reported at 694 F.2d 1 (1st Cir. 1982). That opinion and the unreported opinion of the District Court for the District of New Hampshire are set forth in the appendix to the petition for certiorari filed herein.

Jurisdiction

The jurisdictional basis is set forth in the petition for certiorari.

Constitutional and Statutory Provisions Involved

The provisions set forth in the petition for certiorari are adequate.

Statement of the Case

Petitioner's statement of the case incorrectly represents the scope of the affirmance by the First Circuit Court of Appeals. Petitioner says that the appeals court "did not reach the statute of limitations question, affirming dismissal instead [as to Counts III, V and VI (the last, in part only)] upon its finding that the allegations in those counts were similarly too conclusory to state claims for relief." (Petition, 11)

However, the First Circuit's decision plainly states:

> We agree with the district court that Count One of the complaint failed to state a claim upon which relief could be granted and that the remaining counts were time barred. *Dewey* v. *University of New Hampshire*, 694 F.2d 1, 2. See also App. to Pet., 4a.

In addition, petitioner's statement of the case says that the First Circuit agreed the allegations were too conclusory "*under its more stringent standard of pleading for civil rights cases*". (Petition, 11) (emphasis added) This is *not* what the court said. See App. to Pet., 9a. The petitioner's representation creates the erroneous impression that the First Circuit characterized the standard it was applying as "more stringent". Respondents have not been able to find this lan-

guage in the court's opinion. To the contrary, the court refers to its "criterion for minimal factual allegations." See App. to Pet., 9a.

Further, petitioner's statement of the case intimates that petitioner was handicapped by the magistrate's denial of his discovery motions. (Petition, 10) However, petitioner did not argue on appeal that this ruling was erroneous or prejudicial. The issues raised on appeal to the First Circuit, immediately following the order of dismissal below, were (1) Whether the district court was correct in dismissing Count I for failure to state a claim; and (2) Whether the district court was correct in ruling that Counts II, III, V and VI were time barred.

Finally, it should be noted that the portion of the Faculty Handbook containing the University's mandatory retirement policy, referred to in the complaint, Count I, ¶13 (App. to Pet., 18a.), was considered on the motion to dismiss. The district court ruled as a matter of law that the retirement policy was an element of plaintiff's contractual relationship with the University. The retirement policy included provision for extended employment "[u]nder rare and unusual circumstances and at the discretion and on the initiative of the University". Opinion of district court, App. to Pet., 32a, n.1. Petitioner has never challenged this ruling of law.

Summary of Argument

The reasons advanced for granting the petition for certiorari are invalid. Contrary to petitioner's position, modern federal pleading, as outlined in Rule 8(a)(2), F.R.C.P., does contemplate the statement of circumstances, occurrences, and events to give fair notice of what the plaintiff's claim is and the grounds upon which it rests. Although the federal rulemakers, for the sake of flexibility and clarity, rejected the code phrase "cause of action", Rule 8(a)(2), by its own terms, does require that the complaint show the court *the pleader is entitled to*

relief. Petitioner erroneously assumes the court was obligated to accept his conclusory and subjective characterizations unsupported by factual allegations.

Under the "fair notice" standard, what constitutes sufficient notice naturally varies from case to case. Courts should enjoy reasonable latitude and discretion to define sufficient notice in each case in order to achieve the objectives of modern federal pleading. The refinement of distinctions—which would be the inevitable results were certiorari granted to review lower courts' determinations of pleading sufficiency in cases such as the instant one—would destroy the very flexibility intended by the federal rulemakers.

It is reasonable to require in cases where motivation is a critical element of the pleader's claim that the allegations give rise to the inference of proscribed motivation. Likewise, where the First Amendment is asserted as the basis for relief, it is reasonable to require that the allegations indicate the subject matter of the allegedly protected speech. In the instant case, the First Circuit did not require detailed pleading of evidentiary facts. The court's expectations were reasonable, consistent with the "fair notice" standard of Rule 8(a)(2), and in harmony with other circuits' expectations generally.

A 1968 district court decision from the Second Circuit, purporting to carve an exception to "notice pleading" for civil rights cases, does not signal a current conflict in the circuits calling for Supreme Court action. The First Circuit's decision in the instant case is within the continuum of decisions requiring more than unsupported, vague and conclusory allegations to state a claim for deprivation of federal rights. No ground for certiorari exists here.

Argument

I. Petitioner's Contention That The First Circuit Departed From The Federal Pleading Standard Of Rule 8(a)(2) In This Civil Rights Case Is Based Upon The Perennial Misconception That Information To Support A Claim Need Not Be Averred Under The Rule.

The simplified pleading requirements of Rule 8, F.R.C.P., have not done away with the plaintiff's obligation to furnish some detailed information in support of the claim being presented so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining and can see that there is some legal basis for recovery. *Davis* v. *Passman*, 442 U.S. 228, 237 n.15, citing 2A *Moore's Federal Practice*, ¶8.13, at 1704-05 (2d ed. 1975); *see Conley* v. *Gibson*, 355 U.S. 41, 48 (1957).

Professors Wright and Miller have noted that even *Conley, supra*, the leading case discussing the philosophy of modern federal pleading, indicates "that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claims being presented." 5 *Wright & Miller, Federal Practice and Procedure* (hereinafter "*Wright & Miller*"), §1215 at 112. Moreover, whether the pleading need present a complete formal cause of action or not, it "*must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory*, even though it may not be the theory suggested or intended by the pleader, *or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.*" *Id.* §1216 at 121-23. (emphasis added)

As one court has stated:

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t*

> and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery... Therefore, if a pleader cannot allege definitively and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court. *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Hawaii 1953)

In 1952, a resolution was adopted at the Ninth Circuit Judicial Conference providing that Rule 8(a)(2) should be amended to require a pleading to contain "a short and plain statement of the claim, showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action.*" (Proposed addition in italics) *See generally* Discussion, Claim or Cause of Action, 13 F.R.D. 253 (1951). The proposal was, in part, a reaction to the opinion of Judge Charles E. Clark, the principal draftsman of the federal rules, in *Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944).

The Ninth Circuit's recommendation was referred to this Court's Advisory Committee on the Civil Rules. In the Committee's Report of October, 1955, it declined to amend Rule 8(a)(2) and responded thus to its critics:

> *Note.* Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee.
>
> *The criticisms appear to be based on the view that the rule does not require the averment of any information as to what has actually happened.* That Rule 8(a) envisages

> the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated. . . . . The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. *The decision in Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944), to which proponents of an amendment to Rule 8(a) have especially referred, *was not based on any holding that a pleader is not required to supply information disclosing a ground for relief.* The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.
>
> . . . .
>
> It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading, does away with the confusion resulting from the use of "facts" and "cause of action"; and *requires the pleader to disclose adequate information as the basis of his claim for relief* as distinguished from a bare averment that he wants relief and is entitled to it. (emphasis added)

Professors Wright and Miller have lamented the adoption of the label "notice pleading" to describe modern federal pleading since it leads to the view rejected in the Advisory Committee's 1955 Report, namely, that federal pleading "does not require the averment of any information as to what has actually happened." These commentators suggest that:

> If a label is needed to distinguish pleading under the rules from that of the codes and the common law, "modern

> pleading" or "simplified pleading" would be more appropriate. *Wright & Miller*, §1202 at 63.

The commentators acknowledge that in *Conley, supra*, this Court referred to "simplified 'notice pleading' ", but they emphasize that this Court required the complaint to give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. at 48, quoted in *Wright & Miller* §1202 at 63-64, §1215 at 112.

Judge Clark, himself, in a decision subsequent to his controversial opinion in *Dioguardi, supra*, stated:

> It is too often overlooked that federal pleading is still issue pleading, presenting a definite issue for adjudication; the use of the term 'notice pleading'—which was rejected by the rule-makers and never employed by them—is prejudicial to a proper operation of the federal system, since it suggests the absence of all pleadings and the necessity of some substitute by way of pre-pre-trial. *Padovani* v. *Bruchhausen*, 293 F.2d 546, 550-51 (2d Cir. 1961).

Professors Wright and Miller state:

> What constitutes a short and plain statement must be determined in each case on the basis of the nature of the action, the relief sought, and the respective positions of the parties in terms of the availability of information and a number of other pragmatic matters. *Wright & Miller*, §1217 at 127.

See also 2A *Moore's Federal Practice*, ¶8.13 at 8-124, 125 (2d ed. 1983); *Mountain View Pharmacy* v. *Abbott Laboratories*, 630 F.2d 1383, 1386-87 (10th Cir. 1980); *City of Gainesville* v. *Florida Power and Light Co.*, 488 F. Supp. 1258, 1263-64 (S.D. Fla. 1980).

The First Circuit in the instant case cited the following decisions, which describe the pleader's obligation in each case as follows:

(1) *O'Brien* v. *DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976).

> We are not holding the pleader to an impossibly high standard; *we recognize the policies behind rule 8 and the concept of notice pleading.* A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But *when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.* (emphasis added).

(2) *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977).

> While a complaint need only set out "a generalized statement of facts", there must be enough information "to outline the elements of the pleaders' claim" [footnote omitted]. Wright & Miller, *Federal Practice and Procedure:* Civil §1357. More detail is required than a plaintiff's bald statement "that he has a valid claim of some type", and courts do "not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened...." *Id.*

(3) *Fisher* v. *Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

> Complaints based on civil rights statutes must do more than state simple conclusions; they must at least outline the facts constituting the alleged violation. [citations omitted] Paragraphs 15, 17 and 18 are plainly of *the invalid conclusory variety merely reflecting plaintiff's subjective characterization of defendant's motive and actions.* (emphasis added)

(4) *Leonardo* v. *Moran*, 611 F.2d 397, 398 (1st Cir. 1979). However, Leonardo pleaded no facts to tie his transfer to maximum security to his exercise of his right of access to the courts. Plaintiff omitted such basic facts as the nature of his "grievances" before the district court and whether they were directed at prison officials. . . . Nor did the complaint allege that defendants communicated a threat of revenge to Leonardo. . . . Finally, Leonardo alleged that his transfer was due "in part" to his having filed grievances with the court. *Such ambiguity about defendants' motivation—a crucial element of his case* . . . —together with the other deficiencies discussed *supra cause this complaint to fall short of even the minimum factual recitations* allowed complaints of this nature. . . . (emphasis added)

(5) *Glaros* v. *Perse*, 628 F.2d 679, 684 (1st Cir. 1980).

In a case allegedly involving surveillance, we do not think it unrealistic or unfair to expect a plaintiff to describe briefly in his complaint the activities of each defendant said to have surveilled him and how his constitutional rights were impinged upon. Indeed, this is necessary to stating a claim because all surveillance is not *per se* violative of constitutional rights. . . .

. . . . Missing were a description of the means used in surveilling and monitoring Glaros, the nature of the alleged intrusion, and in some instances the location and timing of such activities. *Not enough was said about the conduct of the defendants . . . to distinguish their behavior from that of an ordinary nosey neighbor.* . . . [T]here was no outline of how those defendants' conduct violated any of Glaros' constitutional rights. (emphasis added)

In the instant case, the First Circuit summarized its requirements generally as follows:

> We require more than conclusions or subjective characterizations. We have insisted on at least the allegation of a minimal factual setting. It is not enough to allege a general scenario which could be dominated by unpleaded facts.... *Dewey, supra*, 694 F.2d at 3. See also App. to Pet., 7a.

These requirements are consistent with the "fair notice" standard of Rule 8(a)(2). In none of the cases has the court required any specific technical form of pleading, or required any statement of detailed evidentiary facts. In *O'Brien* v. *DiGrazia, supra*, the court expressly recognized the concept of "notice pleading". Nowhere does the court purport to go beyond the standard of Rule 8(a)(2) or to substitute a more stringent standard for civil rights cases. The decisions cited reflect the recognized principle that the appropriate level of specificity depends on the issue in question.

Finally, the First Circuit's statement of what is required where motivation is a key element of the claim is consistent with this Court's holding in *Snowden* v. *Hughes*, 321 U.S. 1, 10 (1944).

> The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "wilful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust and oppressive administration of the laws of Illinois. . . . Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws....

Petitioner's contention here, that the First Circuit's standard for pleading in civil rights cases is more stringent than called for under the federal rules, typifies the perennial misconception that the federal pleading rules do not require the averment of any information as to what has actually happened. This misconception should be recognized for what it is and rejected as a basis for certiorari.

II. Petitioner's Contention That The First Circuit Has Created An Exclusive Pleading Standard For Civil Rights Cases Is A Misstatement Which Ignores The Nature Of The Individual Claims For Which Greater Specificity Is Required For Sufficient Notice.

Petitioner's other contention, that the First Circuit applies a more stringent pleading standard in civil rights cases than in other types of cases, is equally ill-founded, and for the reason already set forth in Part I, *supra:* the degree of specificity needed to satisfy the "fair notice" standard depends on the issue in question.

The principle, of course, is well established that the simplified pleading requirements of Rule 8, F.R.C.P., apply to all federal civil actions, regardless of their size or complexity. *Nagler* v. *Admiral Corporation*, 248 F.2d 319 (2d Cir. 1957). However, this principle "does not mean that all federal pleadings are intended to exhibit the same degree of specificity." *Wright & Miller*, §1221 at 151.

> In some contexts the pleader may be obliged to provide a lengthier narrative than in others because of peculiarities in the factual or legal background of the case. *Id.*

In the context of civil and constitutional rights, the difference between a constitutional deprivation, a contractual violation, or no legally cognizable injury at all must be deter-

mined from the circumstances in each case. Whether a federal right is implicated is often a factor of motivation, such as retaliation or discriminatory intent. For example, there is no federally protected right *per se* in holding a professorship at a state university. There is no blanket federal protection against erroneous, ill-advised or adverse employment decisions affecting state employees, but an improper motive can impinge on constitutionally protected rights. *Bishop* v. *Wood*, 426 U.S. 341, 349-50 (1976). "Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." *Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14. Disagreements between professors and their deans are not afforded routine First Amendment protection. *See Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City Board of Ed.* v. *Doyle*, 492 U.S. 274 (1977); *Connick* v. *Myers*, U.S. No. 81-1251 decided April 20, 1983, 51 LW 4436.

Therefore, in civil rights cases, in order to show that the pleader has a claim entitling him to relief, it may be necessary in some contexts to provide a lengthier narrative. In situations where *per se* violations are not involved, where the official action complained of is routine, innocuous on its face, or within official discretion, the allegations must be sufficient to overcome the presumption of regularity. Where motivation is a key element of the pleader's claim for relief, the allegations must be sufficient to raise the inference of improper motive. Otherwise, no federal claim is stated. *Fisher* v. *Flynn*, *supra*; *Leonardo* v. *Moran*, *supra*; *Glaros* v. *Perse*, *supra*. *See also McDonald* v. *Hall*, 610 F.2d 16, 19 (1st Cir. 1979) (dissenting opinion):

> Claims involving proof of intent do not, to be sure, lend themselves easily to summary disposition. . . . . On the other hand, as the right to transfer is a clearly established part of prison officials' authority, *Montanye* v. *Haymes*,

> 427 U.S. 236. . . (1976), I think it only *reasonable to require that sufficient factual background be provided to support a claim that a transfer was unconstitutionally motivated. Requiring the allegation of facts and circumstances giving at least minimal shape and credibility to the First Amendment claim would appear necessary to overcome the usual presumption that inmate transfer is a rightful exercise of prison officials' broad discretion* to relocate prisoners at will. (emphasis added)

In view of the flexibility intended by the modern rules, defining what is necessary to state a claim showing that the pleader is entitled to relief should be largely a matter for the discretion of the trial court in each instance. The fact that the nature of the claim being presented requires more detail to constitute sufficient notice in the court's view does not mean that a more stringent standard is being applied to the category of cases generally.

III. Petitioner's Identification Of A Conflict Between The Circuits Is A Question Of Degree—Not A Substantial Or Sharp Conflict Calling For Resolution By This Court.

Petitioner's argument that there exists a conflict between the circuits about the pleading standard for civil rights cases is borrowed from 2A *Moore's Federal Practice*, ¶8.17 [4.-1] at 8-175 through 8-178. (Petition, 14) Moore's treatise bases the asserted conflict on *Valley* v. *Maule*, 297 F. Supp. 958, 960-61 (D. Conn. 1968); certain decisions from the Third Circuit, which call for factual specificity in civil rights pleadings; and *United States* v. *Gustin-Bacon Div., Certain-Teed Products Corp.*, 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970).

In *Gustin-Bacon*, the Tenth Circuit rejected reversion to "a detailed pleading of evidentiary matters" in a "pattern or practice" action brought by the United States Attorney General under 42 U.S.C. §2000e-6(a). The court stated at the outset:

> The single question on appeal is what Congress intended by requiring that complaints filed under 42 U.S.C.A. §2000e-6(a) must set forth "facts pertaining to such pattern or practice." *Id.* at 540.

Considering the relationship of the specific statutory pleading provision with federal Rule 8(a), the court concluded:

> We find no suggestion in the Civil Rights Act of 1964...which supports appellees' contention that Congress intended to require the Attorney General to revert to a detailed pleading of evidentiary matters.
>
> ...[W]e think Congress meant that the Attorney General's belief...must be reflected on the [face] of the complaint. And that this may be done by a *pleading of fundamental facts* of the character herein alleged. *Id.* at 542-43. (emphasis added)

Gustin-Bacon, *supra*, thus does not reject the requirement for pleading *facts* in support of a claim of racial discrimination. Indeed, the Tenth Circuit's holding is cited with approval in *Marshall* v. *Electric Hose and Rubber Company*, 65 F.R.D. 599, 605 (D. Del. 1974). In *Marshall*, the district court finds the Third Circuit pleading requirements for civil cases; the "fair notice" standard of Rule 8(a)(2); and the holding of *Gustin-Bacon*, *supra*, all in harmony about the degree of specificity in pleading required. 65 F.R.D. at 605. This conclusion by the Delaware district court refutes the view of the

supposed "conflict" in the circuits described in Moore's treatise and set forth by the petitioner here. (Petition, 14-15)

Some cases may require more specificity than others, or employ language indicative of varying degrees of stringency; but there is no significant difference in the courts' application of the "fair notice" standard which would call for certiorari, particularly in the instant case from the First Circuit, whose decisions are acknowledged by Moore's treatise itself to fall within the great majority of cases rejecting unsupported, vague, or conclusory allegations. 2A *Moore's Federal Practice*, ¶8.17 [4.-1] at 8-178 and n.11 (2d ed. 1983).

Respondents' survey of circuit cases bears out this observation that vague and conclusory allegations will not survive motions to dismiss. *See, e.g.*, Second Circuit - *Ostrer* v. *Aronwald*, 567 F.2d 551 (2d Cir. 1977); *Albany Welfare Rights Org. Day Care Ctr., Inc.* v. *Schreck*, 463 F.2d 620, 622-23 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973);

Fourth Circuit - *Johnson* v. *Mueller*, 415 F.2d 354 (4th Cir. 1969); *Hagerstown Kitchens, Inc.* v. *Bd. of Cty. Com'rs., Etc.*, 547 F. Supp. 46, 48 (D. Md. 1982); *Opara* v. *Modern Mfg. Co.*, 21 F.R. Serv. 2d 499, 501 (D. Md. 1975);

Fifth Circuit - *Hanson* v. *Town of Flower Mound*, 679 F.2d 497, 504 (5th Cir. 1982); *Burnett* v. *Short*, 441 F.2d 405, 406 (5th Cir. 1971);

Sixth Circuit - *Place* v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Blackburn* v. *Fisk*, 443 F.2d 121, 124 (6th Cir. 1971); *Kurzawa* v. *Mueller*, 545 F. Supp. 1254, 1262 (E.D. Mich. 1982);

Seventh Circuit - *Jafree* v. *Barber*, 689 F.2d 640, 643, 644 (7th Cir. 1982); *Cohen* v. *Illinois Institute of Technology*, 581 F.2d 658, 663 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135 (1979);

Eighth Circuit - *Kaylor* v. *Fields*, 661 F.2d 1177, 1183 (8th Cir. 1981); *Anderson* v. *Sixth Judicial District Court*, 521 F.2d 420, 421 (8th Cir. 1975);

Ninth Circuit - *Hutchinson* v. *U.S.*, 677 F.2d 1322, 1327-28 (9th Cir. 1982); *Williams* v. *Gorton*, 529 F.2d 668, 670-71 (9th Cir. 1976);

Tenth Circuit - *Coopersmith* v. *Supreme Court, State of Colorado*, 465 F.2d 993, 994 (10th Cir. 1972); *Martinez* v. *Winner*, 548 F. Supp. 278 (D. Col. 1982);

D.C. Circuit - *Lamont* v. *Forman Brothers, Inc.*, 410 F. Supp. 912, 915 (D. D.C. 1976); *cf. Richardson* v. *Rivers*, 335 F.2d 996, 999 (D.C. Cir. 1964); *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

Moreover, it is noteworthy that at least two recent Third Circuit decisions place that circuit squarely within the "fair notice" tradition of Rule 8(a)(2). In *United States* v. *City of Philadelphia*, 644 F.2d 187, 204 (3rd Cir. 1980), the court states:

> The rule is well established in this circuit that a civil rights complaint that relies on vague and conclusory allegations does not provide "fair notice" and will not survive a motion to dismiss. [footnote omitted] We require a modest degree of factual specificity in civil rights complaints. . . .

The court goes on to identify important goals served by this requirement, including "fundamental principles of comity and federalism." *Id.* at 206. Although *Valley* v. *Maule, supra*, is quoted in *City of Philadelphia*, the "exception to the general rule of notice pleading", which *Valley* purported to recognize for civil rights cases in 1968, is not adopted by the Third Circuit.

In *Ross* v. *Meagen*, 638 F.2d 646, 650 (3d Cir. 1981), the Third Circuit says it has "demanded that a civil rights complaint contain a *modicum of factual specificity*, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." (emphasis added) This is consistent

with the practice in all circuits. The Connecticut district court's characterization of the pleading requirements there as an exception to, rather than an illustration of, the practice under Rule 8(a)(2) in civil rights cases is mere nomenclature. *Valley's* so-called "exception to the general rule . . ." has not been adopted in either its own Second Circuit or elsewhere. It offers no foundation for certiorari.

IV. Petitioner's Complaint Was Properly Dismissed For Failure To Satisfy The "Fair Notice" Pleading Standard Applied By The First Circuit.

Petitioner asserts that the numerous allegations in Counts I, III, V and VI were sufficient to state claims for relief. (Petition, 16) The First Circuit found them bland and too conclusory to state claims for deprivation of First Amendment speech rights and Fourteenth Amendment rights of equal protection and due process.

The First Circuit also *agreed the claims in Counts III, V and VI*, as well as Count II, *were time barred* under the most analogous state statute of limitations.

> We agree with the district court that Count One of the complaint failed to state a claim upon which relief could be granted and that the remaining counts were time barred. *Dewey, supra*, 694 F.2d at 2. See also App. to Pet., 4a.

The statute of limitations issue has not been raised in the petition for certiorari filed herein. In view of this, and the First Circuit's disposition of Counts III, V and VI on timeliness as well as insufficiency grounds, only petitioner's contention that Count I was not insufficient will be addressed by respondents here.[1]

[1] The statute of limitations bar was not raised against the First Amendment claim in Count I below. The question of whether Count I was timely has thus never been reached.

Count I was amended twice by petitioner. Indeed, the most striking aspect of this case has been the petitioner's persistent unwillingness to furnish more information about the alleged retaliation by the defendant Spitz, Dean of the College of Arts and Sciences. Both the court of appeals and the district court commented upon this curious reluctance to furnish more details in support of the First Amendment claim.

The First Circuit stated in its opinion:

> In the instant case the complaint alleges that plaintiff, over a period of six years prior to the critical decision in the fall of 1977, spoke on a number of issues of public interest involving the University, disagreeing with defendant Spitz. *Despite the fact that nearly eight months elapsed from the filing of the complaint* (July 29, 1981) *to the filing of a second motion to amend it* (March 12, 1982), *during which time the lack of specificity in the complaint had been vigorously challenged, there was no effort to fill in the gaps as to the nature of the issues discussed*, the particular occasions, their recentness or remoteness, the position of the University, the importance of the controversy, the prominence or lack of prominence of plaintiff's comments. *Instead, the allegations described what we assume would be true of any thinking and reasonably articulate faculty member during the decade of the seventies.*
>
> . . .
>
> . . .Not only is it apparent that two presidents, a vice president, a dean, and the personnel committee of the Board of Trustees, as to none of whom is there an allegation of a controversy with plaintiff, consistently adhered to the decision not to extend to plaintiff post-65 employment, but there is the conceded policy of the University, set forth in the Handbook, that only in "rare and unusual circumstances" and at the discretion of the University,

would employment be continued for a faculty member who had reached 65. See App. to Pet., 8a. (emphasis added)

The district court described the pleading deficiency as follows:

> Plaintiff's allegations do not raise the inference that defendant Spitz should have supported the plaintiff's retention beyond the mandatory retirement age under the University's existing policy, and without more, do not raise the inference that a mandatory policy was discriminatorily applied. As plaintiff himself alleges, the "decision" to apply the policy was supported and upheld by higher levels of administration. The usual presumption is that the retirement policy in effect at the time was a rightful exercise of the University's Board of Trustees' discretion in faculty employment matters. [citations omitted]
>
> *Nor do plaintiff's allegations, even as twice-amended* [footnote omitted], *raise the inference that he was retaliated against for exercising his First Amendment rights.* To state a claim for relief plaintiff must allege facts or circumstances which give at least some rudimentary shape to his claim that defendant Spitz "acted knowingly, maliciously, and out of retaliation against the aforementioned exercise by plaintiff of his First Amendment rights." [citations omitted]
>
> [That] plaintiff expressed views on "University matters" of "public concern" that were contrary to those of defendant Spitz is merely plaintiff's subjective and conclusory assessment of the nature and legal effect of his alleged disagreement with defendant Spitz; *even after an opportunity to amend his complaint to meet defendant's specific arguments on the motion to dismiss, plaintiff*

> ***has still failed to mention the subject matter of his views or outline any events or circumstances from which his legal conclusions reasonably follow.*** See App. to Pet., 36a-37a. (emphasis added)

In the petition for certiorari, petitioner represents that "the thrust of [the] amended complaint is that the entire on-paper policy of the University regarding retirement . . . was in fact no longer being observed at the time of petitioner's forced retirement." (Petition, 18) This assertion was not, however, made in the complaint, even as twice-amended. It is an overstatement for petitioner to make this representation, and obviously it was too late to amend the complaint in argument to the First Circuit, or now in a petition for certiorari. *See Hanson* v. *Town of Flower Mound*, *supra*, 679 F.2d at 504 (5th Cir. 1982).

The last amended version of the allegations themselves stop just short of making such an assertion that the policy was no longer being followed. (See ¶26, Motion for Leave to Further Amend Compl., App. to Pet., 29a.) Further, as petitioner himself alleged, the "decision" to apply the policy was supported and upheld by higher levels of administration, including the personnel committee of the Board of Trustees, as to none of whom was there an allegation of any controversy with petitioner.

The courts are entitled to draw inferences from complaints which fall short of making plain, direct allegations on key elements of the claim. *O'Brien* v. *DiGrazia*, *supra*, 544 F.2d at 546 n.3 (when complaint omits facts which would dominate the case, it is fair to assume those facts do not exist). *See also Jenkins* v. *McKeithen*, 395 U.S. 411, 425-26 (1969), (dissenting opinion of Justices Harlan, Stewart and White) (only plausible inference from omission of certain allegations was that appellant had no facts to support them).

In the instant case, petitioner has not raised the issue that discovery was necessary to supply the omitted factual allegations. Moreover, such an assertion would be entitled to no credence since petitioner must have known the matters about which he and the dean allegedly disagreed. *Kaylor, supra*, 661 F.2d at 1184.

The First Circuit's holding that Count I failed to state a claim for relief was reached after careful consideration of the circumstances of this case, in light of "the criterion of minimal factual allegations that we have consistently required." (App. to Pet., 9a.) The petition fails to demonstrate that the court departed from the accepted and usual course of judicial proceedings so as to call for certiorari in this case.

Conclusion

For all the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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